IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16718 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

FATESINH @ PAPPU @ FATIYO @ KAKUDO LALABHAI BILVAD

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 16718 of 2003

MR ANIL S DAVE for Petitioner No. 1

MR KAMEN N SHUKLA for Petitioner No. 1

Ms P B Sheth, AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 23/03/2004

ORAL JUDGEMENT

The petitioner-detenu has preferred this petition

under Article 226 of the Constitution of India for appropriate writ, order or direction for quashing and setting aside an order dated 11.10.2003 passed by respondent No. 1 under section 3(2) of the Gujarat Prevention of Anti-social Activities Act, 1985 (for short, 'the PASA Act') directing detention of the present petitioner on the ground that four offences were registered against the petitioner during the period from 5.8.2003 to 24.9.2003 and two unnamed witnesses had given statements against the petitioner stating that the petitioner was guilty of violating 'public order'. The petitioner was arrested on the date of the order itself and he is under detention since then. The petitioner has challenged the aforesaid order of the detention on various grounds. It has been contended that the petitioner has not committed any violation of public order and that the order has been passed against the petitioner without proper application of mind. That therefore, the order of detention is illegal and deserves to be set aside. The petitioner has, therefore, prayed that the impugned order of detention be set aside and the petitioner may be set at liberty forthwith.

2. On receiving the petition, rule was issued and in response to the service of notice of rule, Ms. P B Sheth, learned AGP has appeared. She has also submitted affidavit of the detaining officer which is taken on record. At the stage of final hearing, learned Advocate for the petitioner has argued that though four offences have been registered against the petitioner during the period from 5.8.2003 to 24.9.2003, and though two unnamed persons appear to have given some statements against the petitioner, the petitioner is not shown to be a person who could be treated to be dangerous person or a person who has committed violation of public order and, therefore, the detaining authority ought not to have passed the order in question directing his detention in terms of the said order.

3. On going through the detention order dated 11.10.2003 placed at page no.15, it is found that four offences have been registered against the petitioner during the aforesaid period. They all related to the offences punishable under section 457, 380, 511 read with section 114 of IPC.

4. Learned Advocate for the petitioner has contended that looking to the nature of the offences registered against the petitioner as mentioned hereinabove, they are stray incidents which may affect some individuals. It may also affect the law and order situation. However, it

does not affect the public order.

4.1. In support of the said argument, learned Advocate for the petitioner has relied upon the judgment of this Court dated 10.3.2004 passed in Special Civil Application No.16720/2003. While hearing and dealing with said similarly situated case, this court considered a decision in the case of Amanullakhan K Pathan V. State of Gujarat, reported in 2000 (4) GLR 3623. It would be relevant to refer paras 4 and 5 of the said judgment as under:

"Para 4. If the grounds of detention is examined, it is crystal clear that apart from the criminal case which had been registered against the detenu for having formed a gang and hatched a conspiracy to extort money from the innocent citizens by threatening them and keeping them under constant fear of death, the two witnesses examined by the detaining authority narrated the incident that happened on 26.7.1998 and 2.8.1998 in which the detenu was involved and on the first occasion a sum of Rs.1 lac was demanded and when the person concerned refused, he was dragged and assaulted and on the second occasion, a sum of Rs.50 thousand was demanded and on refusal, the persons were dragged on the road and were beaten on the public road. It is not the grievance of the detenu that the statements of the aforesaid two witnesses had not been appended to the grounds of detention or had not been mentioned in the grounds of detention. In fact, the grounds of detention clearly mention the aforesaid state of affairs and there is no bar for taking these incidents into consideration for the satisfaction of the detaining authority that whether the person is a "dangerous person" within the ambit of section 2(c) of the Act.

para 5. The activities of the detenu by trying to extort money from ordinary citizens by putting them to fear of death and on their refusal to part with the money to drag them and torture them on public road, undoubtedly affected the even tempo of life of the society, and therefore, such activities cannot be said to be a mere disturbance of law and order. In Court's considered opinion, the activities of the detenu are such that the detaining authority was satisfied that such activities amount to disturbance of public order and to prevent such

disturbance, the detention order was passed.

Even an activity violating an ordinary legal provision may in a given case, be a matter of public order. It is the magnitude of the activities and its effect on the even tempo of life of the society at large or with a section of society that determines whether the activities can be said to be prejudical to the maintenance of public order or not."

5. It is required to be considered that the above decision was subsequently considered by this Court. This Court was also required to deal with a similarly situated matter in the case of Ashokbhai Jivraj v. Police Commissioner, Surat, reported in 2000(1) GLR 816. It will be relevant to reproduce para 21 thereof hereunder:

"21. So far as the cases against the detenu are concerned, they have already been registered. They were against persons mentioned therein which is stated in the grounds of detention by the detaining authority. Regarding two statements, having taken into account the law laid down by the Supreme Court in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 and reiterated from time to time including the decisions referred to by us hereinabove, the case falls under the maintenance of "Law and Order" and not "Public Order". The subjective satisfaction arrived at by the detaining authority, therefore, cannot be said to be legal, valid and in accordance with law. Since in the facts and circumstances, an order of detention could have been passed by the detaining authority for maintenance of "Public Order", the order deserves to be quashed and is hereby set aside. The detenu is ordered to be set at liberty forthwith unless required in any other case. Appeal is accordingly allowed. No order as to costs. Before parting with the matter, we may observe that recently, we have come across few cases wherein no counter-affidavits are filed by the respondents. It is settled law that whenever an order of detention is challenged by a detenu or by his "next friend", it is the duty of the authorities to justify the action by filing counter-affidavit preferably by the detaining authority himself, unless there are circumstances which may justify filing of affidavit by an officer or authority other than the detaining authority (Vide

Halsbury's Laws of England, 4th Edition, vol.II, paras 1492-95, pp. 791-33; Mohd. Subrati v. State of W.B., AIR 1973 S 2684, Khudram v. State of W.B., AIR 1975 SC 550; Ranjit Singh v. State of Pepsu, AIR 1959 SC 843, Dulal v. State of W.B. AIR 1974 SC 2561; Abdul Gaffar v. State of W.B., AIR 1975 SC 1496, Krishna Murari v. Union of India, AIR 1975 SC 1877, Shaikh Hanif v. State of W.B. AIR 1974 SC 679; Vijay Narain v. State of Bihar, AIR 1984 SC 1334; Suraj Pal v. State of Maharashtra, AIR 1986 SC 2177."

6. In above view of the matter it is found that in the present case also four cases under IPC have been registered against the petitioner, nevertheless, it is also a fact that these are the offences which can be treated to be individual offences against the properties of the individuals involved in those cases. Such offences or such acts on the part of the petitioner could not be treated to be a threat to the "public order" and, therefore, the detaining authority would not be justified in passing orders of detention on such grounds, which would amount to threat to "law and order". As regards two other statements of unnamed persons, again it is a matter of stray incidents at different places with respect to differrent persons. Looking to the time lag between the two and looking to the time lag between the dates of the occurrences of those incidents and the dates on which their statements came to be recorded by the police officers and the dates on which those statements were verified by the detaining authority, I am of the opinion that it cannot be said that again these statements would give a cause of action to the detaining authority for passing an order of detention against the petitioner. It is very clear a threat to "public order" may amount to threat to "law and order". But a threat to law and order would not amount to a threat to "public order". It is extremely clear that before passing an order of detention of a detenu, the detaining authority must come to a definite finding that there is threat to the "public order". The difference between "public Order and "law order" has been demonstrated in the earlier decisions and considering those decisions, it is very clear that the present case would not fall within the category of a threat to a public order and therefore, the order of detention cannot be sustained in the eye of law. In other words, the detaining authority had no reason to pass an order for detaining the detenu in exercise of powers conferred by section 3(2) of the said Act. In that view of the matter, when the order of detention has been passed by the detaining authority without having

adequate grounds for passing the said order, it cannot be sustained and, therefore, it deserves to be quashed and set aside.

10. For the foregoing reasons, this petition is allowed. The impugned order dated 11.10.2003 passed by respondent No.1 in exercise of powers under section 3(2) of the PASA Act detaining the present petitioner, is ordered to be set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute to the aforesaid extent. No order as to costs. D.S. permitted.

[D P Buch, J.]

msp